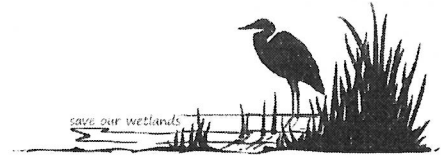


# Law Office of Jack Silver

P.O. Box 5469 Santa Rosa, California 95402  
Phone 707-528-8175 Fax 707-528-8675  
lhm28843@sbcglobal.net



## **VIA REGISTERED MAIL - RETURN RECEIPT REQUESTED**

June 12, 2014

Humberto M. Molina  
Public Works Director  
City of Livingston  
1416 C Street  
Livingston, CA 95334

Jose A. Ramirez  
City Manager  
City of Livingston  
1416 C Street  
Livingston, CA 95334

### **Re: Notice of Violations and Intent to File Suit Under the Resource Conservation and Recovery Act**

Dear Mr. Molina, Mr. Ramirez, and Members of the City Council:

#### **NOTICE**

On behalf of California River Watch ("River Watch"), this letter provides statutory notification ("Notice") to the City of Livingston ("City") of continuing and ongoing violations of the Federal Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6901 *et seq.* in conjunction with continuing pollution transported through groundwater pumped from City Well No. 8 located on North Main Street between Celia Drive and Nut Tree Road in Livingston, California ("Well 8").

The RCRA requires that sixty (60) days prior to the initiation of an action for violation of a permit, standard, regulation, condition, requirement, prohibition or order effective under the RCRA, a private party must give notice of the violation to the alleged violator, the Administrator of the Environmental Protection Agency ("EPA") and the State in which the violation is alleged to have occurred.

RCRA also requires that a private party provide ninety (90) days prior notice to the alleged violator, the Administrator of the EPA and the State in which the violation is alleged to have occurred before initiating an action which alleges violations resulting in imminent and substantial endangerment to human health or the environment. However, such an action may be brought immediately after such notification when a violation of Subtitle C of RCRA is alleged (subchapter III, 42 U.S.C. § 6921 *et seq.*).

Subchapter C of the RCRA requires hazardous waste to be tracked from the time of its generation to the time of its disposal, and further requires that such waste not be disposed of in a manner which may create a danger to human health or to the environment.

On or about July 2004, the City was informed by the California Department of Public Health (“DPH”) that testing of several water supply wells within the City limits revealed high concentrations of the pollutant 1,2,3 Trichloropropane (“TCP”). The City, in its May 23, 2011 “*Request For Proposal – Engineering Design Services For 1,2,3 Trichloropropane (TCP) Treatment At The City Water Supply Well No. 8*” (“RFP”), states that the City “has been collecting TCP data since April 2004 on a regular basis. The most recent test results have indicated the ... TCP concentrations range between 340 to 430 parts per trillion (ppt) for Well No. 8.”

The RFP notes that while there is no Maximum Contaminant Level (“MCL”) for TCP, the State of California “has established a Public Health Goal (PHG) for TCP of 0.7 parts per trillion (ppt) and a Notification Level (NL) of 5 ppt. The Detection Limit for Reporting Purposes (DLR) for TCP is also 5ppt ... All City wells contain TCP at levels in excess of both the PHG and NL, and will require treatment when resources become available. Because City Well No. 8 has high concentrations of TCP and a large industrial water user in the City [Foster Farms] has agreed to advance the costs of treatment, the City is able to move forward with the design and construction of a TCP treatment facility at this time.”

No treatment facility has been constructed as of the date of this Notice. Water from Well No. 8, contaminated with TCP that is well over 500 times the PHG and approximately 80 times the DLR, is currently being provided to City residents. River Watch contends that the City’s transport of this hazardous waste in violation of Subchapter C of the RCRA creates an imminent and substantial endangerment to human health or the environment.

River Watch hereby notifies the City that at the expiration of the appropriate notice period under the RCRA, River Watch intends to commence a civil action against the City or will amend the Complaint filed in the U.S. District Court, Eastern District of California, in the case entitled *California River Watch vs. City of Livingston*, Case No. 1:14-CV-00437-AWI-MJS, pursuant to 42 U.S.C. § 6972(a)(1)(B).

Under RCRA, 42 U.S.C. § 6972(a)(1)(A), Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement, or order which has become effective under the RCRA, shall include sufficient information to permit the recipient to identify the following specific information:

1. *Specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated:*

RCRA, enacted in 1976, is a Federal law of the United States contained in 42 U.S.C. §§ 6901-6992k, the goals of which are to protect the public from harm caused by waste disposal; to encourage reuse, reduction, and recycling; and, to clean up spilled or improperly stored wastes. RCRA specifically protects groundwater.

The EPA's waste management regulations are codified at 40 C.F.R. §§ 239-282. Regulations regarding management of hazardous waste begin at 40 C.F.R. § 260. Pursuant to the RCRA, California has enacted laws and promulgated regulations that are at least as stringent as the federal regulations.

River Watch contends the City has no hazardous waste permit for the storage, treatment or disposal of hazardous or solid waste at Well 8; and, that the City's alleged transport of TCP through Well 8 as described in this Notice presents an imminent and substantial endangerment to human health or the environment pursuant to 42 U.S.C. § 6972(a)(1)(B).

2. *The Activity Alleged to Constitute a Violation:*

River Watch has set forth narratives in this Notice describing with particularity the activities leading to violations. In summary, the RCRA requires that the environment and public be protected from hazardous wastes, including those transported by the City via Well 8. The specific pollutant transported by the City – TCP, constitutes hazardous waste under the RCRA, and is required to be managed such that potential and actual harm to the environment and public is eliminated.

The DPH describes clearly the dangers to human health and the environment associated with TCP:

In 1999, we established a 0.005-micrograms per liter (µg/L) drinking water notification level for 1,2,3-trichloropropane (1,2,3-TCP). This value is based on cancer risks derived from laboratory animals studies (US EPA, 1997). The notification level is at the same concentration as the analytical reporting limit, as described below. Certain requirements and recommendations apply if 1,2,3-TCP is detected above its notification level.

The 1,2,3-TCP notification level was established after its discovery at the Burbank Operable Unit (OU) – a southern California Superfund hazardous waste site – because of concerns that the chemical might find its way into drinking water supplies. It had been found in several drinking water wells elsewhere in the state at that time. Subsequently 1,2,3-TCP was found in more drinking water sources (see below).

1,2,3-TCP causes cancer in laboratory animals (US EPA, 2009). It is reasonably anticipated to be a human carcinogen (NTP, 2011), and probably carcinogenic to humans, based on sufficient evidence of carcinogenicity in experimental animals (IARC, 1995). In 1999, 1,2,3-TCP was added to the list of chemicals known to the state to cause cancer [Title 22, California Code of Regulations, Section 12000].

CDPH's precursor, the Department of Health Services (CDHS), in its 2001 monitoring guidance described 1,2,3-TCP as having various industrial uses and historic pesticide uses, with the primary possible contaminating activity appearing to be hazardous waste sites. Its industrial uses, according to NTP(2011), have been as a paint and varnish remover, cleaning and degreasing agent, and a cleaning and maintenance solvent, and as a chemical intermediate. Its association with past pesticide uses includes its presence in dichloropropenes (as a byproduct/impurity) and in the manufacture of DD (a dichloropropane-dichloropropene mixture), used as a soil fumigant (IARC, 1995). <http://www.cdph.ca.gov/certlic/drinkingwater/Pages/123tcp.aspx>; last updated 2/25/14).

In 2005, the City initiated litigation against Dow Chemical, Shell Oil and other entities for their illegal disposal of TCP to groundwaters used by the City as its water supply. The City's Public Works Director, Kathryn Reyes, stated in her 2011 deposition:

"I'm serving contaminated groundwater to people in my community.... Everybody in this room wouldn't want to give that water to their kids. I don't want to give it to my community, and my hands are tied, and you know it.... We have no funds. We are a poor community. And if I shut the wells off, every single well, where is my community going to move to? That's my source of water. That is my groundwater that I have to serve my people. Of course, I want to remove all of [the TCP]. If I had funds, I would." (<http://www.sherleff.com/1-2-3-trichloropropane-tcp.html>)

A confidential settlement of this litigation resulted in payment to the City by the defendants of moneys earmarked for the installation of a treatment facility to remove the

TCP from the City's wells. Treatment, funded by the litigation settlement, has not as of the date of this Notice been implemented. The alleged violations therefore continue.

3. *The person or persons responsible for the alleged violation:*

The entity responsible for the alleged violations is the City of Livingston, referred to as "the City" throughout this Notice.

4. *The date or dates of violations or a reasonable range of dates during which the alleged activities occurred.*

The RCRA is a strict liability statute with a 5-year statute of limitations; therefore, the range of dates covered by this Notice is June 12, 2009 through June 12, 2014. River Watch will from time to time supplement this Notice to include all violations which occur after the date of this Notice. The majority of the violations identified in this Notice such as discharging pollutants to surface and ground waters and failure to implement the requirements of the RCRA are continuous, and therefore each day is a violation.

5. *The full name, address, and telephone number of the person giving notice:*

The entity giving this Notice is California River Watch, a non-profit corporation organized under the laws of the State of California, dedicated to protect, enhance and help restore the groundwater and surface waters environs of California including, but not limited to, its rivers, creeks, streams, wetlands, vernal pools, and tributaries.

River Watch may be contacted via email: [US@ncriverwatch.org](mailto:US@ncriverwatch.org), or through its attorney. River Watch has retained legal counsel with respect to the issues raised in this Notice. All communications should be addressed to:

David Weinsoff, Esq.  
Law Office of David J. Weinsoff  
138 Ridgeway Avenue  
Fairfax, CA 94930  
Tel. 415-460-9760  
Email: [david@weinsofflaw.com](mailto:david@weinsofflaw.com)

Jack Silver, Esq.  
Law Office of Jack Silver  
P.O. Box 5469  
Santa Rosa, CA 95402-5469  
Tel. 707-528-8175  
Email: [lh28843@sbcglobal.net](mailto:lh28843@sbcglobal.net)

## **LIABILITY/VIOLATIONS**

MCLs and Water Quality Objectives ("WQOs") exist to ensure protection of the beneficial uses of water. Several beneficial uses of water exist, and the most stringent WQOs for protection of all beneficial uses are selected as the protective water quality criteria. Alternative cleanup and abatement actions need to be considered which evaluate the

feasibility of, at a minimum: (1) cleanup to background levels, (2) cleanup to levels attainable through application of best practicable technology, and (3) cleanup to protective water quality criteria levels. Existing and potential beneficial uses of area groundwater include domestic, agricultural, industrial and municipal water supply.

The Regional Water Quality Control Board has adopted a Water Quality Control Plan, commonly known as the “Basin Plan” which designates all surface and groundwater at or near Well 8 as capable of supporting industrial and domestic water supply. The pollutant TCP in the groundwater being pumped at Well 8 has been characterized as “hazardous waste” and “solid waste” within the meaning of the RCRA. Accordingly, all regulatory mandates applicable to hazardous or solid waste apply to its transport.

River Watch alleges the City to be a present transporter of a solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. River Watch alleges the City has: failed to prevent a release; failed to properly detect and monitor releases; failed to properly report and keep records of the release; and, failed to take proper corrective action.

Between June 12, 2009 and June 12, 2014, ongoing violations of RCRA as described herein have occurred. The City has caused or permitted, or threatens to cause or permit, hazardous waste to be discharged from Well 8 where it is, or probably will be, supplied as water for human consumption and public use, creating, or threatening to create, a condition of pollution or nuisance. The discharge and threatened discharge of such waste is deleterious to the beneficial uses of water, and is creating and threatens to create a condition of pollution and nuisance which will continue unless the discharge and threatened discharge is permanently abated. The City has known of the contamination of the groundwater pumped at Well 8 since at least 2004, and has also known that failing to promptly remediate the pollution allows the contamination to migrate through soil and groundwater at and adjacent to Well 8, and to continually contaminate and re-contaminate soil, ground and surface waters.

Past or current violations of the RCRA authorize the assessment of civil penalties. The enforcement provisions of 42 U.S.C. §§ 6928(a) and 6928(g) provide for penalties when conditions of hazardous waste disposal have been alleged. Accordingly, under these provisions, persons or entities violating RCRA are subject to a penalty of \$37,500 per day per violation.

The City’s use and storage of TCP at Well 8 between June 12, 2009 and June 12, 2014 has allowed significant quantities of hazardous constituents to be released or discharged into soil and groundwater in violation of provisions of the RCRA and California hazardous waste regulatory programs. Contaminant levels of TCP in Well 8 are significantly greater than the PHG and DLR. TCP is a known carcinogen and toxin known to harm animals, plants, and aquatic organisms. In its concentration at Well 8 and proximity to sensitive receptors such



as ground water, surface water, plants, insects, animals, aquatic organisms and humans, TCP creates an imminent and substantial endangerment to public health and the environment.

Violations of the RCRA of the type alleged herein are a major cause of the continuing decline in environmental quality and pose a continuing threat to existing and future drinking water supplies of California. With every discharge, groundwater supplies are contaminated. These discharges can and must be controlled in order for the groundwater supply to be returned to a safe source of drinking water.

In addition to the violations set forth above, this Notice is intended to cover all violations of the RCRA evidenced by information which becomes available to River Watch after the date of this Notice, and seeks all penalties and other enforcement provisions related to such violations.

The violations of the City as set forth in this Notice affect the health and enjoyment of River Watch members who reside, work and/or recreate in the affected area. These members use this watershed for domestic water supply. Their health, property rights, use and enjoyment of this area is specifically impaired by the City's violations of the RCRA as alleged in this Notice.

#### **REQUESTED RELIEF**

River Watch requests full investigation of Well 8 including the following:

- a. Comprehensive Sensitive Receptor Survey. – A comprehensive sensitive receptor survey which will include an aquifer profile, surface water study, water supply survey, and building survey;
- b. Aquifer Profile Study. – Aquifer profiles identifying all water bearing strata and communication with the other aquifers. Testing of all aquifers determined to be contaminated zones by TCP and other known pollutants at the Well 8 site and in communication with the surface unconfined aquifer;
- c. Conduit/Preferential Pathway Study. – A conduit/preferential pathway study identifying all conduits or preferential pathways such as sand and gravel lenses, utilities, roads, surfaces and other potential pathways for pollution migration. Testing of all conduits and preferential pathways found to have intersected the plume for TCP and all other pollutants at the Well 8 site;
- d. Surface Water Survey. – A study determining if any surface waters have been or have the potential of being contaminated by TCP and all other pollutants at

the Well 8 site. Testing of all surface waters and drainage within 1,500 feet of the outer extent of the plume;

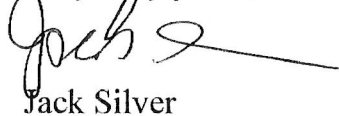
- e. Comprehensive Study of Entire Well 8 site. – A comprehensive investigation of the entire Well 8 site. Testing of soils and ground water in areas where known activities may have contaminated the area including places where Well 8 water was used for irrigation;
- f. Determination of Mass of Plume Constituents. – Mass of the TCP plume and masses of all other pollutants at the Well 8 site to be determined, whether or not part of the “plume;” and;
- g. Toxic Metals Study. – A toxic metals study to include all metals with a reasonable potential of being contaminants.

## CONCLUSION

River Watch believes this Notice sufficiently states grounds for filing suit under the statutory and regulatory provisions of RCRA. At the close of the notice period or shortly thereafter, River Watch intends to either file suit against the City under the provisions of RCRA for each of the violations alleged in this Notice and with respect to the existing conditions at the Site, or amend the Complaint filed in the U.S. District Court, Eastern District of California, in the case entitled *California River Watch vs. City of Livingston*, Case No. 1:14-CV-00437-AWI-MJS, to add the RCRA violations identified in this Notice.

During the notice period, however, River Watch is willing to discuss effective remedies for the violations referenced in this Notice. If the City wishes to pursue such discussions in the absence of litigation, they are encouraged to initiate such discussions immediately so that the parties might be on track to resolving the issues set forth in this Notice before the end of the notice period. River Watch will not delay the filing of a lawsuit or the amending of the Complaint above-identified if discussions have not commenced by the time the notice period ends.

Very truly yours,



Jack Silver

JS:lhbm

cc: Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460